

No. 04-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

KATHERINE FLOWERS,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

REPLY BRIEF OF THE UNITED STATES AS APPELLANT
FILED UNDER SEAL

Honorable J. Phil Gilbert
United States District Court Judge

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Defendant contends (Br. 13-15) that this Court lacks jurisdiction to consider this appeal because the government's notice of appeal was untimely.¹ Controlling precedent of the Supreme Court and this Court establishes that the government's April 6, 2004, notice of appeal was timely.

Rule 4(b)(1)(B) Fed. R. App. P., requires the government to file a notice of appeal in a criminal case within 30 days of the district court's entering judgment. It

¹ "Br." refers to defendant's brief filed with this Court on July 19, 2004. "App." refers to the Appendix attached to the government's opening brief filed with this Court on June 28, 2004.

is well established that when the government files a motion seeking reconsideration of the court's ruling within the 30 days prescribed for filing its notice of appeal, the time to appeal runs from the date on which the district court denies the motion.

United States v. Ibarra, 502 U.S. 1 (1991); *United States v. Healy*, 376 U.S. 75 (1964). See *United States v. Powers*, 168 F.3d 943, 947 (7th Cir. 1999). The Supreme Court has explained that it makes no difference how the government's motion is captioned so long as it seeks "'reconsider[ation] [of the] question decided in the case' in order to effect an 'alteration of the rights adjudicated.'" *Ibarra*, 502 U.S. at 7, quoting *United States v. Dieter*, 429 U.S. 6, 8-9 (1976). See *Dieter*, 429 U.S. at 7-8 ("[i]t is true that the Government's post-dismissal motion was not captioned a 'petition for rehearing,' but there can be no doubt that in purpose and effect it was precisely that"). See, e.g., *United States v. Kalinowski*, 890 F.2d 878, 880, 882 (7th Cir. 1989) (motion for correction of illegal sentence qualifies as a motion for reconsideration). This is so even though there is no statute or rule governing the effect of a government motion for reconsideration on the timeliness of an appeal in a criminal case. See *Dieter*, 429 U.S. at 9 n.3; *United States v. Healy*, 376 U.S. 75, 79-80 (1964).

In the instant case, the government filed a Motion to Stay Order and Request For Leave to File Government's Response on February 5, within 30 days of the district court's January 16 expungement order. In its motion, the government twice "move[d] for * * * reconsideration of the" district court's order. (App. 18, 19).

Thus, the government's motion rendered the district court's January 16 order "non-final [and] tolled the time for appeal." *Kalinowski*, 890 F.2d at 882. Because the government filed its notice of appeal on April 6, 2004, or within 30 days of the district court's denial of its motion for reconsideration on March 9, it is timely and this Court has jurisdiction over this appeal.

Citing Rule 4(a)(1)(A), Fed. R. App. P., defendant argues (Br. 14) that the government's motion requesting reconsideration did not extend the time for its appeal because it is not one of the motions listed in 4(a)(4) as tolling the time for filing an appeal. Rule 4(b), not 4(a), applies here, since this is an appeal in a criminal, not civil, case. Defendant filed her motion to expunge using the same criminal case number as the indictment charging her with criminal conduct and the court entered its order in that case, as well. Thus, Rule 4(a) does not apply to this case and this Court has jurisdiction over this appeal because the government's notice of appeal is timely.

CONCLUSION

WHEREFORE, this Court should vacate that portion of the district court's order expunging judicial records of defendant's conviction and remand the case with instructions that the district court require that the records be returned to their original state.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because: this brief contains 623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2004, two copies of the Reply Brief Of The United States and an electronic disk containing a PDF version of the Brief were served by first-class mail, postage prepaid, on the following counsel of record. The reply brief is filed under seal.

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